

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 2:18-CR-244 JCM (DJA)

Plaintiff(s),

ORDER

v.

PHILLIP AVION MCGREGGOR,

Defendant(s).

Presently before the court is Phillip Avion McGreggor's ("defendant") emergency motion to modify sentence. (ECF Nos. 108; 111).¹ The United States of America filed a response (ECF No. 112), to which defendant replied (ECF Nos. 114; 115).²

Also before the court is the government's motion for leave to file sealed exhibit. (ECF No. 113).

I. Background

As relevant to this motion, the court sentenced defendant to 72 months' incarceration on August 28, 2019, for distributing fentanyl. (ECF Nos. 102; 104). While defendant has been incarcerated, the novel strain of coronavirus and COVID-19, the resultant respiratory disease, has run rampant throughout the country and the world. While the court need not reiterate the well-known effects COVID-19 has had on day-to-day life, certain populations are particularly at risk of "severe illness" from the virus: the elderly, asthmatic, immunodeficient, and people with

¹ Defendant filed two iterations of the same motion, the former is redacted (ECF No. 108) and the latter is under seal (ECF No. 111).

² Defendant filed a redacted reply (ECF No. 114) and an unredacted copy under seal (ECF No. 115).

1 HIV. *See* Center for Disease Control, *People Who Are at Higher Risk for Severe Illness*, (April
 2 2, 2020), available at [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
 3 [precautions/people-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) (last accessed May 7, 2020).

4 The CDC’s list of at-risk persons has expanded, and new studies on COVID-19 vis-à-vis
 5 comorbidities continue to be promulgated. *Id.*; *see also, e.g.*, Xianxian Zhao, et al., *Incidence,*
 6 *clinical characteristics and prognostic factor of patients with COVID-19: a systematic review*
 7 *and meta-analysis* (March 20, 2020);³ Safiya Richardson, et al., *Presenting Characteristics,*
 8 *Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New*
 9 *York City Area* (April 22, 2020).⁴

10 Defendant moves this court to commute his time of incarceration to home confinement
 11 “based upon his unique susceptibility to the COVID-19 infection” (ECF No. 28 at 2). The
 12 government opposes the motion because defendant has not exhausted his administrative
 13 remedies, as required by the First Step Act, 18 U.S.C. § 3582(c)(1)(A). (ECF No. 30). The
 14 motion has been thoroughly briefed and, by the court’s estimation, is now ripe for adjudication.
 15 (*See* ECF Nos. 28; 29; 30; 31; 32; 33; 34; 35; 36; 37; 38).

16 **II. Legal Standard**

17 “Even though courts ordinarily have the inherent authority to reconsider its prior orders,
 18 such authority does not exist when there is an “express rule to the contrary.” *United States v.*
 19 *Barragan-Mendoza*, 174 F.3d 1024, 1028 (9th Cir. 1999). One such contrary rule exists in the
 20 sentencing context: “A court generally may not correct or modify a prison sentence once it has
 21 been imposed.” *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (citing 18 U.S.C. §
 22 3582(c)). Thus, the court may modify a sentence only when expressly authorized by statute.

23 The court is expressly authorized to modify a sentence under the compassionate release
 24 provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, Pub. L. No. 115-391,
 25 132 Stat. 5194 (Dec. 21, 2018). 18 U.S.C. § 3582(c)(1)(A). However, courts may consider

26
 27 ³ Available at <https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.full.pdf>. at

28 ⁴ Available at <https://jamanetwork.com/journals/jama/fullarticle/2765184>.

1 compassionate release only “upon motion of the Director of the Bureau of Prisons” *Id.* If a
 2 defendant wants to file such a motion with the court, he must fully exhaust his administrative
 3 remedies before doing so. *Id.* Since the enactment of the First Step Act, a defendant may file a
 4 compassionate-release motion if his application to the BOP goes unanswered for thirty days. *Id.*

5 To be eligible for compassionate release, a defendant must demonstrate: (1) the existence
 6 of extraordinary and compelling reasons, and (2) that he is not a danger to the community. 18
 7 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. Under USSG § 1B1.13, “extraordinary and
 8 compelling reasons” include, amongst other things, terminal illnesses and medical conditions
 9 “that substantially diminishes the ability of the defendant to provide self-care within the
 10 environment of a correctional facility and from which he or she is not expected to recover.”
 11 USSG § 1B1.13.

12 **III. Discussion**

13 As an initial matter, the court grants the government’s motion for leave to file sealed
 14 exhibit. (ECF No. 113). The sealed exhibit consists of defendant’s private medical records,
 15 which are properly filed under seal. (ECF No. 113-1).

16 The court now turns to the instant motion. Defendant asks to be released in light of his
 17 medical conditions, which he contends put him at greater risk of contracting COVID-19. (ECF
 18 No. 111). The government opposes the motion on jurisdictional grounds and also argues that
 19 defendant is not eligible for compassionate release. (ECF No. 112).

20 The court first takes up the jurisdictional issue. The court acknowledges, as the
 21 government points out, that two judges in this district have found that the administrative
 22 exhaustion requirement in 18 U.S.C. § 3582(c)(1)(A) is strictly nonwaivable. *See, e.g., United*
 23 *States v. Cooper*, Case No. 2:14-cr-0228-JAD-CWH (D. Nev. Apr. 29, 2020); *United States v.*
 24 *Cardenas*, Case No. 2:11-cr-0414-APG-CWH (D. Nev. Apr. 29, 2020). Indeed, other courts in
 25 this circuit have similarly found that they lack jurisdiction until the defendant has exhausted his
 26 administrative remedies. *United States v. Gillis*, 2020 WL 1846792, *2 (C.D. Cal. Apr. 9, 2020);
 27 *United States v. Aguila*, 2020 WL 1812159, *1 (E.D. Cal. Apr. 9, 2020); *United States v. Holden*,
 28 2020 WL 1673440, *10 (D. Or. Apr. 6, 2020).

1 However, a significant number of courts have nonetheless waived the administrative
 2 exhaustion requirement, particularly due to the rapid spread of COVID-19. *See, e.g., United*
 3 *States v. Zukerman*, 16-CR-194, 2020 WL 1659880 (S.D.N.Y. Apr. 3, 2020); *United States v.*
 4 *Perez*, ___F.Supp.3d___, 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020). Another court “expressed
 5 its skepticism regarding its authority to grant” compassionate release without *some*
 6 administrative exhaustion and set a one-week response deadline in lieu of the statutory 30 days.
 7 *See United States v. Gross*, No. 15-CR-769 (AJN), 2020 WL 1673244, at *3 (S.D.N.Y. Apr. 6,
 8 2020).

9 These are unprecedented times. As a result of the rapidly-evolving circumstances
 10 surrounding the novel coronavirus pandemic, this court has entertained compassionate release
 11 motions where there had been no meaningful response to a defendant’s administrative
 12 application, *see United States v. Atkinson*, No. 2:19-CR-55 JCM-CWH, 2020 WL 1904585 (D.
 13 Nev. Apr. 17, 2020), and where an asthmatic defendant was only a few days short of the 30-day
 14 mark, *see United States v. Gorai*, No. 2:18-CR-220-JCM-CWH, 2020 WL 1975372 (D. Nev.
 15 Apr. 24, 2020).

16 Here, the court will exercise jurisdiction over defendant’s request. Defendant represents
 17 as follows:

18 On April 14, 2020, and April 16, 2020, counsel spoke with Mr.
 19 McGreggor. After one of these legal calls, counsel talked to his
 20 unit manager at FMC Fort Worth, Mr. Dominic Alvarez. Mr.
 21 Alvarez informed counsel that he was not able to confirm or deny
 22 whether Mr. McGregor is on any “list” for early release given
 23 COVID-19 but that he could inform Mr. McGregor of BOP’s
 24 determination. Later that same day, Mr. McGregor said in a
 25 Corrilinks email that Mr. Alvarez told him that he did not qualify
 26 for home confinement because of COVID-19 for the following
 27 reasons:

- 28 • Mr. McGregor hasn’t completed 50% of his time;
- His recidivism category is “minimum” instead of low;
- Mr. McGregor has a 1996 misdemeanor domestic violence conviction.

(ECF No. 111 at 3–4). Thus, by defendant’s estimation, “it appears that BOP has already made
 this determination of ineligibility because according to Mr. Alvarez, Mr. McGregor is not on

1 any ‘list’ for consideration.” *Id.* at 6. The court finds, on these facts, that defendant has
 2 effectively exhausted his administrative remedies such that further delay is needless and contrary
 3 to the interests of justice.

4 The court now turns to the merits of defendant’s request. As an initial matter, the court
 5 acknowledges the significant public policy implications of feely granting home confinement to
 6 any inmate who expresses a fear of contracting COVID-19. Such a position is untenable because
 7 each and every inmate rightfully fears contracting COVID-19—just as each and every American
 8 does when they must venture from their homes. However, the court must also acknowledge that
 9 the fear of COVID-19 in the penological context is justifiably acute. This requires the court to,
 10 as best it can, strike a delicate balance. Indeed, this very balance is why the BOP is ordinarily
 11 given the first opportunity to review an inmate’s request for compassionate release.

12 Consequently, this court has, thus far, confined its coronavirus-related compassionate
 13 release of inmates to the elderly, asthmatic, immunodeficient, and people with HIV. Further, the
 14 court has released only inmates the government has not argued were a danger to the community.
 15 *See Gorai*, 2020 WL 1975372; *Atkinson*, 2020 WL 1904585.

16 Here, defendant is not elderly or asthmatic and does not have HIV. (ECF No. 111).
 17 Defendant argues that several of his preexisting medical conditions render him immunodeficient
 18 insofar as he may be more likely to contract COVID-19. (*See generally* ECF Nos. 111; 115).
 19 The government argues that defendant is a danger to the community and, preexisting health
 20 conditions notwithstanding, is not so at risk as to justify compassionate release. (*See generally*
 21 ECF No. 112).

22 First, the court has serious reservations regarding whether defendant is a risk to the
 23 community, particularly because it lacks the benefit of BOP’s designation of defendant.
 24 Defendant urges that, with the exception of the instant offense, his criminal history is stale.
 25 (ECF Nos. 111 at 14–15, 20–21; 115 at 8–9). Defendant also contends that none of his criminal
 26 conduct has involved violence. *Id.* In response, the government emphasizes the facts of the
 27 instant case:

28 In this case [defendant] was selling fentanyl which is fatal in the
 even the smallest amounts. During the course of the conspiracy he

1 not only possessed two stolen firearms but saw fit to arm himself
 2 with one of the stolen firearms for the final sale of four kilograms
 3 of fentanyl. Finally, he was detained at his initial appearance in
 this Court as a danger to community.

4 (ECF No. 112 at 19). While the court finds arguments regarding defendant's 1996 misdemeanor
 5 conviction for domestic violence unconvincing, the facts of this case present a sufficient risk to
 6 the community such that the court declines to afford him the extraordinary remedy of
 7 compassionate release.

8 Next, while the court understands defendant's concern regarding COVID-19, the court
 9 does not find that defendant's preexisting medical conditions are sufficiently "extraordinary or
 10 compelling" such that compassionate release is immediately necessary. Defendant's conditions
 11 are ubiquitous in society such that release in this case risks opening the compassionate-release
 12 floodgates. And, on an individual level, defendant has not shown that these conditions are so
 13 severe or unattended while incarcerated to pose a risk that is any more imminent than that which
 14 the country at large faces. To the contrary, the government notes that "the records demonstrate
 15 that [defendant] is receiving attentive and responsive medical care for [his] condition at FMC
 16 Fort Worth." (ECF No. 112 at 18). Thus, the court finds that defendant's medical conditions do
 17 not "substantially diminish[] [his] ability . . . to provide self-care within the environment of a
 18 correctional facility" *See* USSG § 1B1.13.

19 Defendant's motion is denied.

20 **IV. Conclusion**

21 Accordingly,

22 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's emergency
 23 motion to modify sentence (ECF Nos. 108; 111) be, and the same hereby is, DENIED.

24 IT IS FURTHER ORDERED that this order shall not preclude the BOP from
 25 independently determining whether defendant is eligible for home confinement.

26 DATED May 8, 2020.

27 
 28 UNITED STATES DISTRICT JUDGE